Gender, Justice and Judges

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Introduction

The rule of law is said to have two main components. The first is that every person is subject to the law. In Bracton's words, the King is subject to God and the law. The second is that the law must be applied to every person in the same way. Uniform procedures for filing documents, ensuring that the tests for finding the there is a case to answer are applied in the same way in all cases, and adopting sentencing principles so that judges are not tempted to apply the "whom you know" doctrine in the sentencing process, are all processes and judicial norms which are adopted to ensure that no litigant or counsel gets special treatment in the courts. Yet, in the last 60 years, the definition of how the law is to be applied has undergone philosophical and operational changes. If the purpose of the rule of law is to ensure equal access to justice, then how do we give equal access to a person in a wheelchair when there are structural and attitudinal barriers to access to justice? How do we even begin to hear the evidence of a disabled person when our courtrooms have no lifts? How do we give equal access to justice to a woman who is raped, when in our minds we cannot eradicate our own attitudes which create a barrier to hearing the evidence objectively? A gender competent Bench is interested in substantive equality. It is interested, not in asking superficially whether there is the appearance of equality, but in asking whether the way the law is applied prevents a woman or child from attaining a fair hearing from an impartial tribunal. Gender competence is about recognising our own perceptions about male and female roles in society, and understanding how these culturally driven perceptions prevent judges and magistrates from an objective analysis of the evidence. In this paper, I will look at three areas of gender driven barriers in the justice system – the female victim of crime, the female offender, and the female professional.

The Female Victim

Women are more likely to be victims of crime than they are to be offenders. Of course they will be victims of robbery, theft and fraud, together with all other members of society. However in those cases they are less likely to be judged as women. In those cases they are treated like men. It is sexual and domestic violence cases that the barriers emerge to test the real impartiality of the judiciary. This is because judicial officers, who have historically been male, judge sexual and personal behaviour, not in terms of whether the elements of the offence are present, but in terms with their own stereotypical beliefs about women's behaviour. The same attitudes can be seen at police stations and prosecution offices. Before a case gets to the courts, social attitudes prevent the reporting of crimes against women and children. It is suspected that 80% of sexual and family based crimes against women and children are not reported. In comparison, 80% of other crimes are reported, although corruption is suspected to also be significantly under – reported globally. Having survived social barriers which discourage reporting, having survived the pressure at a police station not to proceed further with a case, the victim of sexual and domestic crime then has to confront judicial attitudes. What makes judicial attitudes even harder to deal with, is that

gender based prejudice are usually couched in terms which appear to be objective, and appear to be based on simple credibility issues which are hard to appeal against.

What are the stereotypes which affect judicial objectivity and impartiality? Firstly, there is the stereotype that a woman is either weak or emotional (the protective stereotype) and secondly, there is the stereotype that a woman is manipulative and devious (the evil stereotype). Judicial decisions vacillate between the two. A woman, who complains of rape and assault by her partner, usually falls into the second category. It is for that reason that the law of corroboration was introduced by the English judges. It was introduced because the judges believed that a woman is more likely to lie in sexual cases. Often after the abolition of the Corroboration rule by precedent and by statute, I read judgments by magistrates and judges which say that the rule is not being applied, but which clearly apply it anyway. For instance in one High Court judgment I read the following – "It is only the victim's word against the accused's word. As such I find that there is a reasonable doubt as to whether this offence was committed." Hello? There are many cases where the evidence is one to one. A classic trial within a trial usually centres on the accused's word against the interviewing officer! The one to one situation gives our judicial officers no trouble at all. Why is it problematic when it is a rape case?

Let me give you another example of a gender stereotype driven bias. In a judgment recently I read the following – "I find it very strange that the victim did not tell anyone about the rape until she went to school two weeks later. I find that this raises a reasonable doubt about the credibility of the victim". What is the inherent bias here? It is that a woman who is raped must tell the first person she meets, or the first person the judge thinks she should have reported the rape to. The law on recent complaint is a gender-biased law, because it is an exception to the rule of the inadmissibility of the previous consistent statement. It is gender-biased because in all other cases witnesses may not give evidence of the first time they reported the matter, what they said in the report, and why they chose to go to Valalevu Police Station rather than Samabula Police Station to lodge their complaint. Recent complaint is allowed in sexual cases because there is an underlying belief that a woman who is raped will report the rape at the first available opportunity to an appropriate person. It is the judge who will decide who the most appropriate person is, and what the most appropriate time is. Although the law on recent complaint has been modified to allow late complaints where there are cultural psychological reasons for a late complaint, the discretion presumes sensitivity to the plight of the victim, and her family and cultural background. That assumption in my experience is not well-founded. Do judges really understand how hard it is for a girl or woman to report a rape? In the context of a traditional family where sex is never discussed at all, and where family loyalties demand an absolute silence to outsiders about family problems, to whom does the victim report a family rape or assault? In order to ensure that the law of recent complaint does not become an unconscionable barrier to justice in that woman who are raped are expected to make a hue and cry about the rape, judges who are gender competent will not allow the law to conduct an enquiry into why she did not complain fast enough according to the judges' perception of what was appropriate. Gender competence requires an understanding of the role of woman in families and societies and cultures. However, such understanding must not become ethnic and gender stereotyping. Not all Indo-Fijian girls will react in the same way to domestic violence. The key is to understand without putting people into ethnic or gender boxes.

I now come to the issue of consent. So many judges and magistrates ask why the victim did not struggle. They ask why she did not scream and why she submitted herself day after day to sexual intercourse with the accused. They use this as the basis for an acquittal. These judicial officers do not look closely enough at the definition of consent in the Crimes Decree.

That definition under section 206 of the Crimes Decree reads thus;

(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained—

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner

So, what are the questions that you should ask yourselves, or ask the assessors about consent? Firstly, that submission without physical resistance is not necessarily consent. Secondly, that for a woman or man to consent to an act, consent must have been given freely and voluntarily and with the full mental capacity. If the victim was asleep, or under the influence of drugs or drink, did she have the mental capacity to consent? Thirdly, the victim did not consent if she was forced, threatened, intimidated, or tricked into consenting. And fourthly, where the accused holds a position of authority over the victim, and exercises that authority, submission to sexual intercourse is not consent. Sadly many directions and judgments are driven not by the law and this legal definition, but by the judge's belief that a woman who is raped consents unless she struggles and screams. This view is driven by the judge's private beliefs about female sexual behaviour. It is an example of gender bias. Sadly, it often leads to the creation of an additional barrier for victims of sexual crimes.

Evidence of character and of previous sexual history is prima facie inadmissible. Yet in the course of a trial, evidence often "slips in" which allows the judge to make assessments about the sexual experience of the victim. A girl who goes to night clubs is usually in for a difficult time with the judge, because s/he subconsciously believes that she deserves everything she got. The "what did you expect" line is completely illogical in legal terms. It is a bit like blaming a home owner for a burglary because he doesn't have security. However judges, who believe that a prostitute cannot in law be raped, are similar to the

judges who believe that a man can never be convicted of raping his own wife. In fact the issue of consent rests on evidence of consent to a particular act. Previous consensual acts of carnal knowledge with others, or with the accused can only help us to decide the question of knowledge of lack of consent, or recklessness as to lack of consent. A woman or man has every right to refuse to have carnal knowledge with anyone, even if she previously consented. To deny that right is to shut the door to judicial impartiality.

The best evidence of gender bias in my opinion is usually reflected in sentences. This is often because the judge may not be able to overrule assessors with ease, but can pass a sentence which reflects what a judge thinks of gender roles. Judges have a wide sentencing discretion. The approach of the courts in Fiji to adopt sentencing principles and the tariff approach, does not always prevent a judge from passing a sentence which reflects gender bias. This can sometimes be seen in cases which do not directly involve sexual acts or domestic violence. One example is an old case of homicide where a man beat his de facto partner to death. He was convicted of manslaughter, and sentenced to a substantial term of imprisonment because the degree of violence was high, and the provocation was minimal. The Court of Appeal reduced the sentence saying that this was not a case of gender based domestic violence because the motive for the beating was not that the victim was the accused's wife, but that she had stolen from him! In fact no accused will say that he beat his wife because he has a right to beat his wife! He will say that she was having an affair (an allegation which is hard to prove but often accepted by judicial officers without evidence) or that she was nagging him to give her more money. The hidden message that judicial officers must learn to read, is that he beat he because he thought that he had a right to beat her. The hidden message is that all men have the right to correct their wives. If the presiding judicial officer believes that himself or herself, the accused will have no difficulty at all in getting an absolute discharge without a restraining order.

Why are we so quick to believe the following messages, which then affect the way we deal with a case?

1. The victim asked for the beating;

2. The victim is manipulative and orchestrated the beating/rape/child abuse to punish/blame/trap the innocent accused;

3. The victim was a person of loose sexual morals;

4. The victim was an unfaithful wife;

5. The accused just "snapped" after years of suffering nagging, infidelity and verbal abuse;

6. The victim was after the accused's money;

7. The victim is lying to explain a consensual act of rape for which she is caught out.

We are eager to accept these propositions because they accord with our own preconceptions about gender. I do not point a finger at male judges and magistrates alone. Female judges and magistrates are just as capable of judging fellow women subjectively. We women were brought up to believe that if we

were “ladies” we would have certain characteristics. Much of our upbringing was symbolic. Loud laughter and loud voices were not acceptable. Underlying that lesson was that women should be seen and not heard. The effect of the lesson is to discourage the complaints of women in the justice system. For the women on the Bench, because, you come from a privileged class of people, and because you yourselves may be the victims of abuse, for which you do not complain because of the class and gender pressure, you may be more judgmental of other women who have complained. Unconsciously, you may judge other women harshly for daring to do what you have not, because it is not, in your mind, what a lady does.

Gender bias has a real and tangible effect on the impartiality of a hearing. We say that judges are independent, and impartial, but until they are able to hear the evidence of a case on the evidence and the law alone, without judging women on the basis of their private biases, they will never be able to deliver an equal justice.

Women as offenders

No criminologist has satisfactorily explained why women offend so much less than men. Women do not commit robberies, burglaries, or bigamy in Fiji. The women at the Women’s Prison are largely there for murder/infanticide, fraud, and possession of drugs. The numbers are small, and the categories of offences that women commit do not change. What we do know however, that for offences committed by women, the law is very ready to accept stereotypical reasons for the commission of the offences. For infanticide, the offence is described in terms of a woman suffering post-partum depression, and losing “the balance of her mind”. In fact most cases of infanticide arise not from medical factors, but from environmental factors such as parental neglect and rejection, the abandonment of the mother by the child’s father, society’s disapproval, and poverty. I do not deny that there is such a thing as post-partum depression. However, in those cases of murder, where infanticide is run as an alternative defence, the common position taken is that the accused was so affected by child birth, that she could not control her urge to kill her baby. The defence (although much broader now under the Crimes Decree) is consistent with the first gender stereotype, that of a weak emotional woman who is prey to her hormones. She is the “type” of woman who needs protection. She can certainly not become President of the United States!

In the 1980’s Katherine Dalton “discovered” a defence of premenstrual tension. According to this defence women at certain times of the month were more prone to criminal offending because they could not control their behaviour. It is fortunate that feminists around the world shot this theory down quickly, so damaging was it to the image of women as thinking, active persons, who are strong enough to make rational decisions for themselves. Yet there were a number of magistrates in the United Kingdom who were willing to accept this defence when it was first argued in court. My point is that when the legal process tends to put women into one of these two “gender boxes”, judiciaries are very quick to accept them and turn them into a rule of law.

Duress is another popular defence run by women. Women offenders often raise the defence that they were forced by their partners, bosses and spouses to commit offences. The underlying theme is that women are very weak by nature and easy to bully. It is the case that in many homes and societies, women

are the victims of violence. It is also true that patriarchy exists to disempower women. However, we should never assume that a woman is too weak to make her own decisions, just as we should never assume that a man is a bully and a thief. The answer for a judge or magistrate is to concentrate on the evidence. If duress is raised, then the question is whether there is evidence to satisfy the legal definition of duress under the Crimes Decree.

Gender and the legal profession

Women have not always been welcomed into the legal profession. Law schools did not permit women to study law until 100 years ago. Discussions around the first women, who entered the legal profession, were largely about whether women were strong enough to survive the pressure in the courtroom. When women lawyers enter the legal profession, they often have to deal with attitudinal barriers in the practice of the law. Those barriers centre on the same stereotypes. Either they are too weak to do the demanding cases, or they are too manipulative and revengeful to do their work objectively. When women were first appointed to the Bench here in Fiji, applications for recusal were made in rape cases on the basis that women could not hear rape cases objectively!

Women still experience a testing time in court when they are first appointed on the Bench. Women judges cannot relate their stories of gender bias on and off the Bench, but there is no doubt that every women who is appointed as the first women on any Bench, has to prove her ability and her competence.

Women are generally underrepresented in all judiciaries. This is despite the fact that the numbers of women lawyers are growing. Appointing agencies, Judicial Services Commissions, and government bodies often believe that women will not make good judges because they are either too weak, or that they lack objectivity. Gender competence is now mandatory as a criteria for appointing judges on the International Criminal Court, and in appointing judges by election, consideration must be given to the need to have a gender balanced Bench. Gender balance gives society confidence that the Bench represents the gender make up of society. It does not however guarantee a gender competent bench. As I have said in this Paper, women can also be guilty of gender bias. However gender balance creates a more representative Bench. If there are barriers to reporting crimes against women and children, then a gender balanced bench may give victims of crime greater confidence in making the decision to report and to prosecute gender based violence.

Conclusion

Judges and magistrates are expected to be independent and impartial in the way that they do their work. Yet they are themselves, products of the society they live in. They are brought up by parents who may have taught them about gender expectations, they may go to churches, temples and mosques where women are segregated and treated differently from men, and they may have partners and spouses whose roles may be driven by culturally driven expectations about the way women behave. We are all subject to social and culturally-driven attitudes.

Recognising our own attitudes, and acknowledging the ways in which these attitudes can prevent us from hearing a case on its merits, is a challenge for judicial officers. Attitudinal barriers to gender justice can

appear in subtle ways - in the way judges sentence a man for beating his wife to death, in the way a non-parole term is set in a serious case of act with intent to cause grievous harm, or in the way a victim is allowed to be cross-examined on the issue of a “late” complaint.

Recognising potential bias and working towards a greater objectivity, must be the aim of every judge and magistrate.